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Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM J. ALT, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the imposition of overwhelmingly disproportionate civil penalties constitute a second punishment where petitioner had previously been punished for the criminal offenses which constituted the *sine qua non* for the subsequent civil penalties?

2. Whether federal internal revenue service civil penalties, including interest-on-interest, exceeding five million dollars for an underlying one million dollar civil tax liability can survive double jeopardy scrutiny in light of *United States v. Halper*, 490 U.S. 435 (1990) as clarified in *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (1996)?

PARTIES TO THE PROCEEDING

The following is a list of the parties to the litigation below. Petitioner, William J. Alt, was the only appellant appearing in case no. 95-1124 in the United States Court of Appeals for the Sixth circuit.

The opinion below lists Rosalinda Alt, Karen Alt and Robert W. Alt as party-defendants. All were defendants, along with petitioner, in the civil case filed by the government under the name and style *United States v. William J. Alt, et al.*, 1:92-CV-657. That civil tax case was brought in the United States District Court for the Western District of Michigan on November 15, 1992.

The United States was the only plaintiff in these proceedings.

CERTIFICATE OF INTEREST

The Petitioner, WILLIAM J. ALT, M.D., is represented in these proceedings by Attorney Allan A. Ackerman, Esq., 2000 N. Clifton Avenue, Chicago, Illinois, 60614. Petitioner's counsel has no interest in these proceedings other than those of the petitioner.

Allan A. Ackerman

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CERTIFICATE OF INTEREST	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2-5
REASONS FOR GRANTING THE WRIT	5-12
CONCLUSION	12
APPENDICES	*infra*

TABLE OF AUTHORITIES

Cases	PAGE
Bursten v. United States, 395 F.2d 976 (5th Cir. 1968)	11
Montana Department of Revenue v. Kurth Ranch, 511 U.S. ____, 114 S.Ct. 1937 (1994)	6
McNichols v. CIR, 13 F.3d 432 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994)	9
Rex Trailer Co. v. United States, 350 U.S. 148 (1956)	8
Thomas v. CIR, 62 F.3d 97 (4th Cir. 1995)	10
United States v. Alt, 83 F.3d 779 (6th Cir. 1996)	3, 5
United States v. Halper, 490 U.S. 435 (1990)	5, 6, 7
United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943)	8
United States v. Ursery, ____ U.S. ____, 116 S.Ct. 2135 (1996)	7, 8

Constitution and Statutes	
United States Constitution, Fifth Amendment	2
26 U.S.C. § 6653	2
26 U.S.C. § 6661	2
26 U.S.C. § 6662	2
26 U.S.C. § 7210	3
26 U.S.C. § 7203	3
28 U.S.C. § 1254(1)	2

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PETITION FOR WRIT OF CERTIORARI

Petitioner, William J. Alt, respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

The district court's December 29, 1994 memorandum decision is unreported. The May 15, 1996 opinion and judgment of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment is reported at 83 F.3d 779 (6th Cir. 1996) and is reproduced at pages 1a to 10a of the appendix to this petition.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit, having had jurisdiction pursuant to 28 U.S.C. § 1291, issued its decision on May 15, 1996. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be subject for the same offence to be twice put in jeopardy of life or limb . . .

The pertinent text of 26 U.S.C. §§§ 6653, 6661 and 6662 are set forth, respectively, at pages 17a to 22a of the appendix to this petition.

STATEMENT

1. Prior to indictment, William J. Alt, M.D. (petitioner), was a respected sixty-two-year-old board certified internist specializing in geriatric cardiology. He had been practicing medicine in the Kalamazoo, Michigan area for over thirty years. The record is barren of any problems with the Internal Revenue Service prior to the 1990 indictment.

On April 3, 1990, petitioner was a named defendant in a five-count indictment filed in the United States District Court for the Western District of Michigan. The indictment alleged that petitioner and his co-defendant-daugh-

ter, Karen Alt, conspired to evade and attempt to evade federal income taxes from on or about January 1, 1981 to April 3, 1990. Count one charged a conspiracy in violation of 18 U.S.C. § 371 and 26 U.S.C. § 7201. Counts two to four alleged illegalities in petitioner's medical corporate and individual tax returns for the years 1984 and 1985. Count five charged Karen Alt with committing perjury in a prior civil district court proceeding. A jury trial culminated in petitioner being convicted on counts one and three. On June 7, 1991 petitioner was sentenced to ten years of federal immurement and fined $200,000.00. The government opposed release pending appeal and petitioner's request for appellate enlargement was denied. He commenced the service of sentence on July 7, 1991.

2. On September 15, 1992, while petitioner was serving his federal prison sentence, the government filed a civil complaint alleging that petitioner and his spouse, Rosalinda, owed the government several millions of dollars for the tax years 1981-1990. The civil complaint alleged, in pertinent part, that petitioner and his spouse owed the government over five million dollars based on their assessed tax deficiency for the years 1981-1990 (totaling approximately one million dollars). The approximate four million dollar difference was based on penalties and interest (and interest on interest) that the government claimed was owed.

3. On June 18, 1993 the United States Court of Appeals for the Sixth Circuit granted petitioner a new trial, *United States v. Alt*, 996 F.2d 827 (6th Cir. 1993). On May 24, 1994 petitioner, represented by appointed counsel, pled guilty to a single misdemeanor offense alleging a violation of 26 U.S.C. § 7203 for the tax year 1984.

The original indictment was dismissed. Petitioner was sentenced to time served (R. 99, pp. 10-11).[1]

4. On October 24, 1994 petitioner, absent counsel, appeared in the United States District Court, Grand Rapids, Michigan in connection with for a status conference on the government's civil lawsuit (R. 109). Petitioner sought to raise constitutional claims. *Id.* at 10-11. Government counsel advised that the case was perplexing and complex. *Id.* at 12. Rather than continue the potential civil trial date, the United States magistrate judge elected to maintain the district court's November 1994 trial setting. *Id.*

5. On November 8, 1994 petitioner, his spouse and members of his family appeared before the Honorable Benjamin F. Gibson in the United States District Court, Grand Rapids, Michigan. The entire family was represented by a single attorney. The government filed a second amended complaint, absent objection (R. 104 at pp. 6-10). The government's case was presented by stipulation with the caveat that defense counsel could submit post-trial pleadings directed toward constitutional issues (*Id.* at p. 10).

On December 29, 1994 Judge Gibson filed a memorandum decision finding that petitioner and his spouse owed over five million dollars, with diurnal escalating statutory penalties, based upon original assessed tax liabilities totalling approximately one million dollars. The dis-

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[1] Karen Alt had been sentenced to ten-years in custody on June 7, 1991. On conviction vacation, she pled guilty to an IRS felony count and was sentenced to time served. The sentencing judge, recognizing the family's destitute circumstances, imposed neither fines nor prosecution costs.

trict court rejected petitioner's double jeopardy importunings (Vol. 5, R. 100; App. 14a, *infra*).

Petitioner appealed, arguing both that the IRS civil penalties violated the Double Jeopardy Clause, and that the Excessive Fines Clause of the Eighth Amendment mandated that the district court engage in balancing the putative wrongs against the penalties imposed. The court of appeals rebuffed both arguments, *United States v. Alt*, 83 F.3d 779, 781-3 (6th Cir. 1996).

REASONS FOR GRANTING THE WRIT

The Court should resolve the unsettled question of what standards apply in determining whether overwhelmingly disproportionate IRS civil penalties can survive double jeopardy scrutiny where the petitioner has already served a prison sentence for the same offenses.

1. In *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892 (1989), the Court affirmed a district court decision applying the Double Jeopardy Clause. The Court held that disproportionate civil penalties were subject to double jeopardy constraints where the defendant suffered an earlier conviction and prison sentence for the same acts. In part, the Court noted:

> Rather, we hold merely that in determining whether a particular civil sanction constitutes criminal punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated.[2]

* * * *

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[2] 109 S.Ct. at 1901, n. 7.

> Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an account of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.[3]
>
> * * * *
>
> In the case before us, I agree with the Court that the controlling circumstance is whether the civil penalty imposed in the second proceeding bears any rational relation to the damages suffered by the Government. Here it does not, so it must be considered punishment for purposes of the Double Jeopardy Clause.[4]

Petitioner's case bears a marked resemblance to *Halper*. Both defendants suffered antecedent criminal convictions. Both served prison sentences. During petitioner's immurement, the government sought civil penalties predicated on the same conduct which gave rise to the criminal conviction. The civil penalties in both *Halper* and at bar bore no reasonable relationship to the government's loss.

2. In *Montana Department of Revenue v. Kurth Ranch*, 511 U.S. ___, 1214 S.Ct. 1937 (1994), the Court held that the Double Jeopardy Clause precluded the imposition of a Montana drug tax following an antecedent Montana criminal drug conviction. The Court's opinion includes:

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[3] 109 S.Ct. at 1902 (n. 9 omitted).

[4] 109 S.Ct. at 1904 (concurring opinion by Justice Kennedy).

> Although we have never held that a tax violated the Double Jeopardy Clause, we have assumed that one might. In the context of other constitutional requirements, we have repeatedly examined taxes for constitutional validity. We have cautioned against invalidating a tax simply because its enforcement might be oppressive or because the legislature's motive was somehow suspect, * * * *Yet we have also recognized that "there comes a time in the extension of the penalizing features of the so-called tax when it loses it character as such and becomes a mere penalty with the characteristics of regulation and punishment."* * * * That comment, together with *Halper's* unequivocal statement that labels do not control in a double jeopardy inquiry, *indicates that a tax is not immune from double jeopardy scrutiny simply because it is a tax.*[5]

Kurth implies that federal tax civil penalties fall within the ambit of the Double Jeopardy Clause shelter. If so, this petitioner squarely presents the question of whether disproportionate federal civil tax penalties are proscribed by the Double Jeopardy Clause where there is an antecedent criminal prosecution and conviction predicated on the same underlying acts.

3. In *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (June 24, 1996), the Court held that the Double Jeopardy Clause has no impact on civil forfeitures as they might relate to antecedent or subsequent criminal prosecutions. *Ursery* resolved the lack of circuit symmetry. In a nutshell, the *Ursery* decision found there are no double jeopardy implications in the context of criminal prosecutions-civil forfeitures. In *Ursery*, the Chief Justice

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[5] 114 S.Ct. 1937, at 1945-46 (1994); internal citations and footnote—omitted; italicized emphasis added.

traced the distinctions between civil forfeiture and civil penalties, citing *United States v. Halper*, 116 S.Ct. at 2144. The *Ursery* opinion notes:

> In *Halper*, we considered "whether and under what circumstances a civil penalty may constitute 'punishment' for double jeopardy analysis." * * *[6]

Ursery continued, noting that double jeopardy protections *clearly applied* to civil penalties, not civil forfeitures. *Id. Halper* had a narrow focus: the distinction between civil penalties and civil forfeiture. In connection with civil penalties, the Court has balanced the size of the particular civil penalty against the government's harm. *Id.*[7]

At bottom, *Ursery* perpetuates the proposition that the Double Jeopardy Clause applies to civil penalties, *albeit* not civil forfeitures.[8]

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[6] 116 S.Ct. at 2143.

[7] Citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956) and *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (in *Rex Trailer*, the Court held that the fines were not "so unreasonable or excessive" as to transform a civil remedy into a criminal penalty; in *Marcus*, the fine was not so disproportionate as to transform the fine into punishment).

[8] Chief Justice Rehnquist, responding to the dissent of Justice Stevens, noted a potential exception: . . . Where the "clearest proof" indicates that an *in rem* civil forfeiture is "so punitive either in purpose or effect" as to be equivalent to a criminal proceeding, that forfeiture may be subject to the Double Jeopardy Clause . . ., 116 S.Ct. at 2148, n. 3.

In the event the Court concludes that the IRS actions at bar are the equivalent of an *in rem* civil forfeiture, the Court may grant relief on that independent ground. Petitioner has presented *clear proof* that the IRS actions are [so] punitive in purpose and effect as to be equivalent to a criminal forfeiture.

4. The case at hand questions whether grossly disproportionate IRS civil penalties, including interest-on-interest, *ad infinitum* are proscribed by the Double Jeopardy Clause.

Two circuit opinions considering the question presented, have ruled harmoniously. Each has eschewed double jeopardy applications to civil IRS penalties, albeit under decidedly different facts from those at bar.

In *McNichols v. CIR*, 13 F.3d 432 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 2705 (1994), the court affirmed an order below finding *McNichols* civilly liable for IRS deficiencies and penalties arising from his illegal drug trafficking activities. In *McNichols*, the plaintiff was a convicted dope dealer who had executed a plea agreement transferring his ill-gotten booty to the government. Within the fabric of that agreement, the plaintiff's monies and property (stipulated to have been derived from dope peddling) went to the government, either by way of an agreed forfeiture or IRS procedures, 13 F.3d at 433. After his plea agreement was enforced and the agreed ten-year sentence imposed, the plaintiff apparently had second thoughts, urging that he be relieved of some of the burdens of his ill-conceived agreement. The court would have none of it; flatly rejecting *McNichol's* double jeopardy theorem:

> *Halper* involved a specific statutory penalty. The circumstances giving rise to the double jeopardy violation were unique. To use *Halper* as a base for vaulting into the tax arena would be to misapply the case and distort its holding. We hold that there was no double jeopardy violation.[9]

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[9] 13 F.3d at 435.

In *Thomas v. CIR*, 62 F.3d 97 (4th Cir. 1995), the court reviewed whether double jeopardy principles precluded the assessment of additional IRS penalties on unreported drug trafficking income. *Thomas* was convicted of drug dealing and money laundering based on plea agreements. As part of the plea, *Thomas* agreed to forfeit his assets, 62 F.3d at 98. Stipulating that he failed to report his income from illegal narcotic sales, *id.*, he challenged only the fraud and interest penalties on the deficiency. *Thomas'* agreed IRS deficiency was $259,000. The combined penalties were $44,068. While affirming the tax court ruling in favor of the Commissioner, the *Thomas* panel held there was a reasonable relationship between the enhanced federal tax liabilities and the government's expenses (losses), 62 F.3d at 100-101. The panel further found that *Thomas* had neither been charged nor convicted of federal IRS offenses and thus, for double jeopardy purposes there was no multiple *punishments* for the same course of conduct. *Id.* at 100.

5. In the case at bar, the court of appeals rejected petitioner's double jeopardy assertions, noting:

> That the penalties are not outrageous in light of this purpose. The fraud penalty is the most onerous, set at fifty or seventy-five percent of the lost tax revenue. The heavy penalty for fraud may be explained by the fact that actively fraudulent filings are more difficult to catch than merely negligent ones. The understatement penalty and negligence penalties, set at twenty-five and five percent respectively, are simply not the type of unusual burden that Halper was meant to police. (App. 7a)

While eschewing the grant of relief, the court of appeals noted that petitioner and his spouse had been ordered to pay $5,053,042.08 as of December 29, 1994.

Inexplicably, the court of appeals found the difference between petitioner's tax liability (slightly over one and a half million dollars) and the amount owed (over five million) to have a differential of slightly over two million dollars (App. 6a). Hence, *Halper* lacked application.

Petitioner asserts that with reasonable mathematical certainty the difference between the amount originally ($1,644,027) and the amount owed in December 1994 ($5,053,042.08) equals $3,409,015.08. Apropos of the inability of lawyers to grasp tax (and perhaps arithmetic) abstractions is a reckoning from *Bursten v. United States*, 395 F.2d 976, 981 (5th Cir. 1968), which notes:

> We must note here, as a matter of judicial knowledge, that most lawyers have only scant knowledge of the tax laws.

Halper's double jeopardy analysis is to be applied on a case-by-case basis. Yet, the Court has not articulated standards for *Halper's* application. Here (rounding off dollars), petitioner's assessed tax liability was one million dollars. Statutory penalties, including interest and interest-on-interest, brought the figure owed the IRS to in excess of five million dollars. The statutory penalties (including interest-on-interest) escalate daily. Lacking guidance from this Court, there is no constitutional impediment to *Halper's* application.

6. In the ensemble, the courts of appeals have shunned *Halper's* double jeopardy entreaties. But, petitioner's case is a far cry from the two appellate decisions analyzing *Halper* in light of plea agreements, endowing property and tax dollars to the government (*McNichols* and *Thomas*, *ante*).

In petitioner's case, the government has never disputed that the civil penalties arose from the same facts, circumstances and criminal offenses giving rise to petitioner's original multi-count indictment, conviction and immurement. Rather, the government's consistent posture has been that *Halper* has no application to the Internal Revenue laws of the United States.

Does *Halper's* double jeopardy analysis have application to the federal Internal Revenue statutes? This petition provides an appropriate vehicle to resolve that unsettled question.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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No. 95-1124

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM J. ALT, M.D.; ROSALINDA ALT; KAREN ALT; ROBERT W. ALT,

Defendants,

WILLIAM J. ALT, M.D.,

Defendant-Appellant.

ON APPEAL from the United States District Court
for the Western District of Michigan

Decided and Filed May 15, 1996

Before: MILBURN and BOGGS, Circuit Judges; and BORMAN, District Judge.*

PER CURIAM. Dr. William Alt appeals a civil verdict for the plaintiff United States in an action to collect back taxes, interest, and statutory penalties under the Internal Revenue Code. Alt, who had already pled guilty to criminal charges of income tax fraud, contends that the

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* The Honorable Paul D. Borman, United States District Judge for the Eastern District of Michigan, sitting by designation.

award of statutory penalties to the government violates the Double Jeopardy and Excessive Fines Clauses of the Constitution. The district court rejected Alt's defense, holding that the award of tax penalties was not "punishment" under *United States v. Halper*, 490 U.S. 435, 447-48, 109 S. Ct. 1892, 1901, 104 L.Ed.2d 487 (1989). We affirm.

I

In January 1991, a jury found Dr. William Alt and his daughter, Karen Alt, guilty of various federal income tax crimes. The United States District Court for the Western District of Michigan sentenced Alt to ten years in prison, and ordered him to pay a $200,000 fine. Alt appealed. This court reversed his conviction on the ground that the district court gave the jury an improper instruction, and remanded the case for a new trial. *United States v. Alt*, 996 F.2d 827, 828-830 (6th Cir. 1993). On May 24, 1994, Alt pled guilty to a misdemeanor offense and was sentenced to time served.

On September 15, 1992, while Alt's original appeal was pending, the United States filed a civil action against Alt seeking back taxes, various statutory penalties for fraud, understatement, and negligence, and interest on these amounts. The parties and the district court agreed to try the factual elements of the case on November 8, 1994, but to address any constitutional claims by Alt in post-trial briefs. The United States proved its affirmative case at trial, Alt offering no evidence to the contrary. On November 28, 1992, Alt filed a post-trial brief arguing that a verdict in favor of the government would violate the Double Jeopardy Clause.

The district court held that the tax penalties were "civil [rather than] punitive in nature"—and were not "punishment" for the purposes of the Double Jeopardy Clause. Alt filed a timely notice of appeal.

II

The Double Jeopardy Clause forbids a second punishment for a single offense. *United States v. Halper*, 490 U.S. 435, 440, 109 S. Ct. 1897, 104 L.Ed.2d 487 (1989). The parties do not dispute that Alt was punished once for his tax offenses. *See United States v. Ursery*, 59 F.3d 568, 572 (6th Cir. 1995), *cert. granted*, 116 S. Ct. 762 (1996) (jeopardy attaches when court accepts guilty plea). The sole issue before us is whether the assessment of tax penalties is another "punishment." A civil award is punishment whenever it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." *Halper*, 490 U.S. at 448, 109 S. Ct. at 1902.

The tax penalties at issue in this case are authorized by 26 U.S.C. §§ 6653(a), 6653(b), and 6661. These sections are located in Chapter 68 of the Internal Revenue Code ("Additions and Penalties"), next to other civil additions to taxes, such as the penalty for not filing a return on time, § 6651, or the penalty for bringing a frivolous action in court, § 6673. The criminal provisions of the Code are located at § 7201 *et seq.* in Chapter 75 ("Crimes"). The Code instructs that the civil penalties are to be assessed, collected, and paid in the same manner as normal taxes. 26 U.S.C. § 6662(a)(1) and (2).

The Supreme Court has held that a civil tax "addition" for a fraudulent filing serves only a remedial purpose,

and does not constitute punishment for the purposes of double jeopardy analysis. *Helvering v. Mitchell*, 303 U.S. 391, 58 S. Ct. 630, 82 L.Ed. 917 (1938). *Accord Traficant v. Commissioner*, 884 F.2d 258, 263 (6th Cir. 1989). In *Mitchell*, the federal government indicted Mitchell for tax fraud. After a jury acquitted Mitchell, the federal government sought tax penalties constituting 50% of the taxes that he did not pay. The Court held that such penalties were not criminal penalties, but were intended by Congress to reimburse the Government for the costs of discovering and recovering losses caused by Mitchell's tax fraud. *Id.* 303 U.S. at 399-405, 58 S. Ct. at 633-36.

Alt argues that the rule expressed in *Mitchell* should be set aside because of three recent cases: *Halper*, 490 U.S. at 435, 109 S. Ct. at 1892; *Dept. of Revenue of Montana v. Kurth Ranch*, ___ U.S. at ___, 114 S. Ct. 1937, 128 L.Ed.2d 767 (1994); and *Austin v. United States*, ___ U.S. ___, 113 S. Ct. 2801, 125 L.Ed.2d 488 (1993). Each of these cases found that a particular civil penalty rose to the level of "punishment." In *Halper*, the defendant Medicare provider made sixty-five false claims, each resulting in a loss to the government of nine dollars. The government prosecuted the defendant for fraud, and the defendant was convicted. The government then filed a separate civil action to recover a $2,000 civil penalty for each of the sixty-five violations. The Court held that a civil penalty "more than 220 times greater than the Government's measurable los[s] qualified as punishment." *Halper*, 490 U.S. at 436, 109 S. Ct. at 1895. In *Kurth*, the defendant was convicted of a federal drug violation. The State of Montana then sought a "tax" from the defendant equal to approximately eight times the market value of the drugs that the defendant had been convicted of pos-

sessing. The Court held that this "tax" constituted punishment because it was disproportionately high, conditioned on conviction for the predicate federal crime, and clearly intended to punish. *Id.* ___ U.S. at ___, 114 S. Ct. at 1947. In *Austin*, the defendant used his home and small business to store certain drugs. After he pled guilty to state law drug offenses, the federal government sought forfeiture of his home and business. The court held that the civil forfeiture provisions of 21 U.S.C. §§ 881(a)(4) and (a)(7) could not be said to serve solely a remedial purpose, and that they therefore constituted "punishment" for the purposes of Excessive Fines Clause analysis.

Together, these three cases clearly suggest that *some* civil tax additions can be punishment. *Halper*, 490 U.S. at 447, 109 S. Ct. at 1901 ("the labels 'criminal' and 'civil' are not of paramount importance"); *Kurth*, ___ U.S. at ___, 114 S. Ct. at 1946 ("a tax is not immune from double jeopardy scrutiny simply because it is a tax"). However, the three cases address extraordinary circumstances where a civil penalty either (i) had *no* remedial purpose, or (ii) was several times greater than necessary to achieve a remedial purpose. The three cases do not say that all tax additions are punishment, or even that any civil provision of the tax code is punishment. In fact, the flagship of the three, *Halper*, cites *Mitchell* as an example of a perfectly acceptable type of civil sanction.

> The relevant teaching of [*Mitchell* and similar cases concerning other types of civil penalties] is that the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages, without being deemed to have imposed a second punishment for the purpose of double

> jeopardy analysis. These cases do not tell us, because the problem was not presented in them, what the Constitution commands when one of those imprecise formulas authorizes a supposedly remedial sanction that does not *remotely* approximate the Government's damages and actual costs, and rough justice becomes clear injustice.

Halper, 490 U.S. at ___, 109 S. Ct. at 1892 (emphasis added). We read this language in *Halper* to mean that the only civil fraud penalties that constitute "punishment" are those that do not remotely approximate the amount of money that the Government would be entitled to were it simply trying to recoup a loss. *Ibid.*

In Alt's case, the amount of the penalty is a fixed proportion of the taxes that Alt wrongly failed to pay. The principal amounts of the taxes and the penalties are as follows:

YEAR	TAX DUE	FRAUD PENALTY	UNDERST. PENALTY	NEGLIGENCE PENALTY	TOTAL DUE
1981	$83,655	0	0	$4,183	$87,838
1982	$78,510	$39,255	$19,627	$3,926	$141,318
1983	$180,890	$90,455	$45,223	$9,045	$235,158
1984	$160,170	$80,085	$40,043	$8,009	$288,307
1985	$68,123	0	$17,031	$3,406	$88,560
1986	$227,466	$170,600	$56,867	0	$454,933
1987	$226,508	$169,881	$56,627	0	$453,016
1988	$213,997	$160,498	$53,499	0	$427,994
1989	$404,708	$303,531	0	0	$708,239
TOTALS	$1,644,027	$1,014,295	$288,917	$28,569	$2,975,808

Appellee's Brief at 8. The district court ordered Alt to pay $5,053,042.08 to the United States. The $2,077,234.08 difference between Alt's original liability and the amount he now owes represents interest on the taxes and penalties.

According to the chart above, Alt is liable for an average of eighty-one cents in penalties for every dollar that he fraudulently underpaid. The stated purpose of the tax penalties at I.R.C. §§ 6653(a), 6653(b), and 6661 is to compensate the government for "the costs of investigation, detection, and recovery of . . . lost money." *Barnette v. Commissioner*, 95 T.C. 341, 347-48 (1990). The penalties are not outrageous in light of this purpose. The fraud penalty is the most onerous, set at fifty or seventy-five percent of the lost tax revenue. The heavy penalty for fraud may be explained by the fact that actively fraudulent filings are more difficult to catch than merely negligent ones. The understatement penalty and negligence penalties, set at twenty-five and five percent respectively, are simply not the type of unusual burden that *Halper* was meant to police. *Accord Karpa v. Commissioner*, 909 F.2d 784, 788 (4th Cir. 1990) ("[w]e cannot say that a 25% penalty [for understatement] is overwhelmingly disproportionate" to the government's loss). In fact, *Halper* itself distinguished its situation from that of a prior case in which the government recovered double damages for fraud. *Halper*, 490 U.S. at 445-46, 109 S. Ct. at 1900 (citing *Rex Trailer Co. v. United States*, 350 U.S. 148, 76 S. Ct. 219, 100 L.Ed. 149 (1956) (double fraud damages against people falsely claiming to be veterans is not "punishment")).

> [W]e have recognized that in the ordinary case fixed-penalty-plus-double-damages provisions can be said to do no more than make the Government whole.
>
> . . . .
>
> We cast no shadow on these time-honored judgments.
>
> . . .

Halper, 490 U.S. at 449, 109 S. Ct. at 1902. Since the Supreme Court has reaffirmed its holding that a hundred-percent penalty can be rationally related to the costs of catching and prosecuting fraud, we feel bound to hold that a eighty-one percent penalty can be as well.

Of course, a simple comparison of the size of the civil penalty to the amount of probable financial damage will not resolve every case under *Halper*. Other factors, such as Congress's stated purpose and historical ideas about particular remedies, are relevant in determining when someone is "punished" by a particular law. *See Kurth Ranch*, 114 S. Ct. at 1946 ("neither a high rate of taxation nor an obvious deterrent purpose automatically [makes a] tax a form of punishment"). A convincing discrepancy between the penalty and the actual loss (or anticipated actual loss), however, does seem to be a prerequisite to punishment—at least when a statute offers a remedial reason for the sanction. No convincing discrepancy exists in Alt's case.

Alt tries to avoid *Halper*'s incorporation of *Mitchell* by stressing *Austin* and other cases about civil forfeiture of property used to make or deal drugs. *E.g.*, *United States v. Ursery*, 59 F.3d 568, 572-73 (6th Cir. 1995), *cert. granted*, ___ U.S. ___, 116 S. Ct. 762 (1996); *United States v. $405,089.23 in United States Currency*, 33 F.3d 1210 (9th Cir. 1994), *cert. granted*, ___ U.S. ___, 116 S. Ct. 762 (1996). These cases have not focused specifically on the value of property seized—relying instead on the clear historical and legislative understanding that forfeiture of property used to commit crimes is a punitive measure. As a result, the focus on the *size* of the sanction, important in *Halper*, takes a back seat to a discussion about the abstract *type* of the sanction. *Austin*, ___ U.S. at ___, 113 S. Ct. at 2812.

Such precedent, however, has little to do with Alt's case. Civil forfeiture is a penalty tied to commission of a criminal offense and unrelated to a specific loss by the government. *See Austin v. United States*, ___ U.S. at ___, 113 S. Ct. at 2812 (value of property forfeited varies so radically it cannot be said to be rationally related to cost of enforcing drug laws). A civil tax addition can be collected in the absence of a crime (e.g., for negligent filing) and its amount varies proportionately with the taxes wrongly withheld. Nor is Alt correct to argue that civil forfeiture precedent is relevant because the government, in a pleading before the lower court seeking a forced sale of some of Alt's property to pay his debts, asks for a "civil forfeiture judgment." Appellant's Brief at 14. First, the government's label cannot change the nature of the sanction against Alt. *See Halper*, 490 U.S. at 447, 109 S. Ct. at 1901 ("the labels . . . are not of paramount importance"). Second, forfeiture of real property as a statutory sanction for a criminal offense is different than foreclosure on real property because a party cannot pay a monetary debt. Debt foreclosure has sources of authority firmly within the parameters of "civil" law.

Because we hold that the tax penalties awarded against Alt are not "punishment," there is no need to address Alt's claim that the penalties constitute an excessive fine under the Eighth Amendment. Like the Double Jeopardy Clause, the Excessive Fines Clause only protects against "punishment," *see, e.g., Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S. Ct. 2909, 2915, 106 L.Ed.2d 219 (1989) (a fine is a "payment to a sovereign as punishment for some offense"), and the test for "punishment" is the same under both doctrines. *Austin v. United States*, ___ U.S. at ___, 113 S.

Ct. at 2812, (applying test from *Halper* to determine if a civil penalty is punishment for the purposes of the Excessive Fines Clause).

III

Alt was not "punished" by the imposition of the tax penalties. The district court's judgment is therefore AFFIRMED.

(Letterhead Of)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 538
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

TELEPHONE
(513) 684-2953

May 15, 1996

Gary R. Allen
William J. Patton
Allan A. Ackerman

Re: Case No. 95-1124
United States of America v. William J. Alt, et al.
District Court No. 92-00657

Dear Counsel:

The court today announced its decision in the above-styled case.

A copy of the court's opinion is enclosed and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Leonard G. Green, Clerk

Enclosure

swh

cc: William J. Alt
Rosalinda Alt
Karen Alt
Robert W. Alt

By /s/ Linda K. Martin
(Mrs.) Linda K. Martin
Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. 1:92-CV-657
Hon. Benjamin F. Gibson

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM J. ALT *et al.*,
Defendants.

ORDER FOR ENTRY OF JUDGMENT AGAINST WILLIAM J. ALT, ROSALINDA ALT, KAREN ALT, AND ROBERT W. ALT, AND TO FORECLOSE LIENS

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 29th day of December, 1994.

PRESENT: HON. BENJAMIN F. GIBSON,
U.S. DISTRICT JUDGE

Pending before the Court is the United States of America's second amended complaint to reduce federal tax assessments to judgment and to foreclose liens;

WHEREAS pursuant to a pretrial motion by the United States, this Court on December 1, 1994, entered a judgment of default in favor of the United States and against

the corporate defendant William J. Alt, M.D., P.C., in the amount of $522,676.92, plus statutory interest from the dates of assessment, with respect to certain corporate tax liabilities;

WHEREAS this Court on November 3, 1994, entered a judgment of default against the corporate defendants First Church of the Gethsemane, Gethsemane Properties, Inc., Beacon Realty Corporation, Signet Estates, Inc., Lloyds Gardens, Inc., Kirkby Farms, Inc., Rozlynde-Miller Properties, Inc., and K.L. Financial Management, Inc.;

WHEREAS this Court on November 3, 1994, entered a Stipulation and Agreed Order for the sale of the Garfield and the Kirkby properties (Counts 6 and 8) and for a distribution of the sales proceeds on certain other claims and with any remaining proceeds to be paid over to the Clerk of the Court to be held pending further order by this Court; and

WHEREAS this case came to trial before this Court on November 8, 1994;

NOW, THEREFORE, the Court makes the following findings of fact and conclusions of law:

A. The United States presented *prima facie* evidence at trial of its federal tax assessment against the individual defendants William J. Alt, Rosalinda Alt, Karen Alt a/k/a Karen Butler ("Karen Alt"), and Robert Alt ("the individual defendants");

B. The United States presented uncontested evidence as to the outstanding balance of its federal tax assessments against the individual defendants;

C. The individual defendants presented no evidence contesting the validity or the amount of their outstanding assessed tax liabilities;

D. William J. Alt and Karen Alt, through post-trial briefs, assert a double jeopardy claim with respect to their 1984 assessed federal income tax liabilities. They argue that they have been convicted and punished for tax offenses committed during 1984. They further contend that the civil tax penalties assessed for 1984 are punitive in nature and that imposition of the penalties would violate the Fifth Amendment prohibition against double jeopardy.

A civil tax fraud penalty is not punitive in nature:

> [I]n *Helvering v. Mitchell* the Supreme Court specifically held that the civil tax fraud penalty is not punitive in nature but is rather a remedial statute adopted "primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."

Traficant v. Commissioner, 884 F.2d 258, 263 (6th Cir. 1989) (quoting *Helvering v. Mitchell*, 303 U.S. 398, 401 (1938)). The imposition of civil tax penalties, such as those assessed against William J. Alt and Karen Alt, does not violate the double jeopardy clause. *Id.*; *see also Miller v. Commissioner*, T.C. Memo 1994-249, 1994 WL 232368, 67 T.C.M. (CCH) 3042 (1994); *Iannielli v. Commissioner*, 98 T.C. 165 (1992). Defendants' double jeopardy claim fails.

E. The title to the properties described in counts 5, 6, 7, 8, and 9 of the second amended complaint is held in the names of the corporate defendants First Church of the Gethsemane, Gethsemane Properties, Inc., Beacon Realty Corporation, Signet Estates, Inc., Lloyds Gardens, Inc., Kirkby Farms, Inc., Rozlynde-Miller Properties, Inc., and K.L. Financial Management, Inc., as nominees of William J. Alt, Rosalinda Alt, Karen Alt, Robert Alt, and William J. Alt, M.D., P.C.;

IT IS THEREFORE ORDERED as follows:

1. That judgment is entered in favor of the United States and against defendants William J. Alt and Rosalinda Alt, jointly and severally, in the amount of $5,053,042.08, plus statutory interest from November 11, 1994, with respect to their assessed and unpaid joint federal income tax liabilities for the years 1981, 1982, 1983, 1984, 1985, 1986, 1987, and 1988;

2. That judgment is entered in favor of the United States and against defendant William J. Alt in the amount of $1,359,864.23, plus statutory interest from November 11, 1994, with respect to his assessed and unpaid 1989 federal income tax liability;

3. That judgment is entered in favor of the United States and against defendant Karen Alt in the amount of $601,808.64, plus statutory interest from November 11, 1994, with respect to her assessed and unpaid federal income tax liabilities for the tax years 1982, 1983, 1984, 1985, 1986, 1987, 1988, and 1989, and a 100% penalty assessment related to Green's Finishing, Inc.;

4. That judgment is entered in favor of the United States and against defendant Robert Alt in the amount of $486,769.03, plus statutory interest from November 11, 1994, with respect to his assessed and unpaid federal income tax liabilities for the tax years 1985, 1986, 1987, and 1988, and 100% penalty assessments related to Green's Finishing, Inc.;

5. That the corporate defendants First Church of the Gethsemane, Gethsemane Properties, Inc., Beacon Realty Corporation, Signet Estates, Inc., Lloyds Gardens, Inc., Kirkby Farms, Inc., Rozlynde-Miller Properties, Inc., and K.L. Financial Management, Inc., are alter egos and/or

nominees of all of the taxpayers, William J. Alt, Rosalinda Alt, Karen Alt, Robert Alt, and William J. Alt, M.D., P.C.;

6. That the United States' federal tax liens against the individual defendants and corporate defendant William J. Alt, M.D., P.C., attach to each of the properties described in Counts 5, 6, 7, 8, and 9 of the second amended complaint;

7. That the United States' federal tax liens shall be foreclosed on the properties described in Counts 5, 6, 7, 8, and 9 of the second amended complaint;

8. That the Clerk of the Court shall transfer to the United States any remaining proceeds from the sale of the Garfield and the Kirkby properties (Counts 6 and 8) which are paid to the Clerk of the Court;

9. That the United States shall present an order for the judicial sale of the remaining properties (Counts 5, 7, and 9).

IT IS SO ORDERED.

/s/ Benjamin F. Gibson
BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

STATUTORY PROVISIONS

§ 6653. Additions to tax for negligence and fraud

(a) **Negligence.**—

(1) **In general.**—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to negligence (or disregard of rules or regulations), there shall be added to the tax an amount equal to 5 percent of the underpayment.

(2) **Underpayment taken into account reduced by portion attributable to fraud.**—There shall not be taken into account under this subsection any portion of an underpayment attributable to fraud with respect to which a penalty is imposed under subsection (b).

(3) **Negligence.**—For purposes of this subsection, the term "negligence" includes any failure to make a reasonable attempt to comply with the provisions of this title, and the term "disregard" includes any careless, reckless, or intentional disregard.

(b) **Fraud.**—

(1) **In general.**—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 75 percent of the portion of the underpayment which is attributable to fraud.

(2) **Determination of portion attributable to fraud.**—If the Secretary establishes that any portion of an underpayment is attributable to fraud, the entire underpayment shall be treated as attributable to fraud, except with respect to any portion of the underpayment which the taxpayer establishes is not attributable to fraud.

(3) **Special rule for joint returns.**—In the case of a joint return, this subsection shall not apply with respect to a spouse unless some part of the underpayment is due to the fraud of such spouse.

(c) **Definition of underpayment.**—For purposes of this section, the term "underpayment" means—

(1) **Income, estate, gift, and certain excise taxes.**—In the case of a tax to which section 6211 (relating to income, estate, gift, and certain excise taxes) is applicable, a deficiency as defined in that section (except that, for this purpose, the tax shown on a return referred to in section 6211(a)(1)(A) shall be taken into account only if such return was filed on or before the last day prescribed for the filing of such return, determined with regard to any extension of time for such filing), and

(2) **Other taxes.**—In the case of any other tax, the amount by which such tax imposed by this title exceeds the excess of—

(A) The sum of—

(i) The amount shown as the tax by the taxpayer upon his return (determined without regard to any credit for an overpayment for any prior period, and without regard to any adjustment under authority of sections 6205(a) and 6413(a)), if a return was made by the taxpayer within the time prescribed for filing such return (determined with regard to any extension of time for such filing) and an amount was shown as the tax by the taxpayer thereon, plus

(ii) Any amount, not shown on the return, paid in respect of such tax, over—

(B) The amount of rebates made.

For purposes of subparagraph (B), the term "rebate" means so much of an abatement, credit, refund, or

other repayment, as was made on the ground that the tax imposed was less than the excess of the amount specified in subparagraph (A) over the rebates previously made.

(d) No delinquency penalty if fraud assessed.—If any penalty is assessed under subsection (b) (relating to fraud) for an underpayment of tax which is required to be shown on a return, no penalty under section 6651 (relating to failure to file such return or pay tax) shall be assessed with respect to the portion of the underpayment which is attributable to fraud.

§ 6661. Substantial understatement of liability

(a) Addition to tax.—If there is a substantial understatement of income tax for any taxable year, there shall be added to the tax an amount equal to 25 percent of the amount of any underpayment attributable to such understatement.

(b) Definition and special rule.—

(1) Substantial understatement.—

(A) In general.—For purposes of this section, there is a substantial understatement of income tax for any taxable year if the amount of the understatement for the taxable year exceeds the greater of—

(i) 10 percent of the tax required to be shown on the return for the taxable year, or

(ii) $5,000.

(B) Special rule for corporations.—In the case of a corporation other than an S corporation or a personal holding company (as defined in section 542), paragraph (1) shall be applied by substituting "$10,000" for "$5,000".

(2) **Understatement.—**

(A) In general.—For purposes of paragraph (1), the term "understatement" means the excess of—

(i) the amount of the tax required to be shown on the return for the taxable year, over

(ii) the amount of the tax imposed which is shown on the return, reduced by any rebate (within the meaning of section 6211(b)(2)).

(B) Reduction for understatement due to position of taxpayer or disclosed item.—The amount of the understatement under subparagraph (A) shall be reduced by that portion of the understatement which is attributable to—

(i) the tax treatment of any item by the taxpayer if there is or was substantial authority for such treatment, or

(ii) any item with respect to which the relevant facts affecting the item's tax treatment are adequately disclosed in the return or in a statement attached to the return.

(C) Special rules in cases involving tax shelters.—

(i) **In general.**—In the case of any item attributable to a tax shelter—

(I) subparagraph (B)(ii) shall not apply, and

(II) subparagraph (B)(i) shall not apply unless (in addition to meeting the requirements of such subparagraph) the taxpayer reasonably believed that the tax treatment of such item by the taxpayer was more likely than not the proper treatment.

(ii) **Tax shelter.**—For purposes of clause (i), the term "tax shelter" means—

(I) a partnership or other entity,

(II) any investment plan or arrangement, or

(III) any other plan or arrangement,

if the principal purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax.

(3) **Coordination with penalty imposed by section 6659.**—For purposes of determining the amount of the addition to tax assessed under subsection (a), there shall not be taken into account that portion of the substantial understatement on which a penalty is imposed under section 6659 (relating to addition to tax in the case of valuation overstatements).

(c) **Authority to waive.**—The Secretary may waive all or any part of the addition to tax provided by this section on a showing by the taxpayer that there was reasonable cause for the understatement (or part thereof) and that the taxpayer acted in good faith.

§ 6662. Applicable rules

(a) **Additions treated as tax.**—Except as otherwise provided in this title—

(1) The additions to the tax, additional amounts, and penalties provided by this chapter shall be paid upon notice and demand and shall be assessed, collected, and paid in the same manner as taxes;

(2) Any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter.

(b) Procedure for assessing certain additions to tax.—For purposes of subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes), subsection (a) shall not apply to any addition to tax under section 6651, 6654, or 6655; except that it shall apply—

(1) in the case of an addition described in section 6651, to that portion of such addition which is attributable to a deficiency in tax described in section 6211; or

(2) to an addition described in section 6654 or 6655, if no return is filed for the taxable year.